UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

IN THE MATTER OF:	)	
	)	
	)	
Elementis Chromium Inc.,	)	Docket No. TSCA-HQ-2010-5022
f/k/a Elementis Chromium, LP,	)	
	)	
Respondent.	)	
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COMPLAINANT'S RESPONSE TO RESPONDENT'S MOTION REQUESTING THE PRESIDING OFFICER TO RECOMMEND INTERLOCUTORY REVIEW OF THE MARCH 25, 2011 ORDER BY THE ENVIRONMENTAL APPEALS BOARD

Pursuant to the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation/Termination or Suspension of Permits (Consolidated Rules of Practice), 40 C.F.R. § 22.16(b), Complainant, the United States Environmental Protection Agency (EPA or the Agency), hereby submits this Response to Respondent's Motion Requesting the Presiding Officer to Recommend Interlocutory Review of the March 25, 2011 Order by the Environmental Appeals Board. Respondent's Motion should be denied.

Respondent requests in its Motion that the Presiding Officer recommend interlocutory review of the March 25, 2011

Order denying Respondent's Motion for Judgment on the Pleadings. (Resp't Mot. Requesting the Presiding Officer to Recommend Interlocutory Review of the March 25, 2011 Order by the Envtl. Appeals Bd.). As discussed below, the Presiding Officer's March 25, 2011 Order is wholly consistent with the existing case law of the United States Court of Appeals for the District of Columbia Circuit (D.C. Circuit) and the Environmental Appeals Board (EAB or the Board). Respondent has failed to demonstrate that there are substantial grounds for difference of opinion regarding the legal question of whether the TSCA section 8(e) disclosure requirement is continuing in nature. Consequently, Respondent's Motion fails to meet the legal standard for interlocutory review under 40 C.F.R. § 22.29.

Under the Consolidated Rules of Practice, the Presiding Officer may recommend any order or ruling for review by the EAB when:

> (1) The order or ruling involves an important question of law or policy concerning which there is substantial grounds for difference of opinion; and
>
> (2) Either an immediate appeal from the order or ruling will materially advance the ultimate termination of the proceeding, or review after the final order is issued will be inadequate or ineffective.

40 C.F.R. § 22.29(b). Respondent's Motion fails to meet this standard. The Presiding Officer's March 25, 2011 Order concluded that the TSCA section 8(e) disclosure requirement is continuing in nature. (March 25, 2011 Order at 12).

Complainant acknowledges that this ruling involves an important question of law. However, there are not substantial grounds for difference of opinion regarding this question of law.[1] Moreover, given the clarity of the law, an interlocutory appeal will not advance the ultimate resolution of the proceeding, but will serve instead only to delay that resolution.

The Presiding Officer's March 25, 2011 Order is wholly consistent with existing case law of the D.C. Circuit and the EAB:

- First, the March 25, 2011 Order follows the D.C. Circuit's holding that 28 U.S.C. § 2462 is the applicable statute of limitations for administrative enforcement actions brought under TSCA. (March 25, 2011 Order at 5 (citing 3M Co. v. Browner, 17 F.3d 1453 (D.C. Cir. 1994)));

- Second, the March 25, 2011 Order adheres to the EAB's holding that the doctrine of continuing violations is a recognized exception to the general rule of accrual embodied in 28 U.S.C. § 2462. (March 25, 2011 Order at 6 (citing Lazarus, Inc., TSCA Appeal No. 95-2, 7 E.A.D. 318, 364, 1997 EPA App. LEXIS 27 at *105 (EAB 1997)));[2]

[1] Complainant incorporates by reference its argument contained in EPA's response to Respondent's Motion for Judgment on the Pleadings in support of the Presiding Officer's conclusion that the TSCA section 8(e) disclosure requirement is continuing in nature. (Complainant's Memorandum of Law in Opposition to Resp't Mot. for J. on the Pleadings at 6-23).

[2] The EAB first held that the doctrine of continuing violations is a recognized exception to the general rule of accrual in In Re Harmon Electronics, Inc. In Re Harmon Electronics, Inc., RCRA (3008) Appeal No. 94-4, 7 E.A.D. 1, 22, 1997 EPA App. LEXIS 6 at *49 (EAB 1997), rev'd on other grounds, Harmon Indus., Inc. v. EPA, 19 F. Supp. 2d 988 (W.D. Mo. 1998), aff'd, Harmon Indus., Inc. v. EPA, 191 F.3d 894 (8th Cir. 1999). In addition to Lazarus, which the Presiding Officer cited in the March 25, 2011 Order, the Board has made this holding in subsequent cases. In Re Newell Recycling Co., Inc., TSCA Appeal No. 97-7, 8 E.A.D. 598, 614, 1999 EPA App. LEXIS 28 at *36 (EAB 1999) (citing Lazarus), aff'd, Newell Recycling Co., Inc. v. EPA, 231 F.3d 204 (5th Cir. 2000); In Re Norman C. Mayes, RCRA Appeal No. 04-01, 12 E.A.D. 54, 65, 2005 EPA App. LEXIS 5 at *48 (EAB 2005).

- Third, the March 25, 2011 Order conforms with the EAB's holding that, under the doctrine of continuing violations, the limitations period for continuing violations does not begin to run until the illegal course of conduct is complete, and therefore, a penalty action may be initiated from the moment the violation first occurs up and until five years after the violation has been completed. (March 25, 2011 Order at 6 (citing Lazarus, 7 E.A.D. at 364, 1997 EPA App. LEXIS 27 at *105-06));[3]

- Fourth, the March 25, 2011 Order applies the EAB's two-step test for determining whether a particular violation is continuing in nature, which was first adopted by the Board in 1997 and has been employed by the EAB in three subsequent decisions. (March 25, 2011 Order at 6 (citing Harmon, 7 E.A.D. 1, 22, 1997 EPA App. LEXIS 6 at *50));[4]

- Fifth, the March 25, 2011 Order follows the EAB's holding that TSCA contemplates the existence of continuing violations, thereby satisfying the first prong of the EAB test. (March 25, 2011 Order at 6 (citing Lazarus, 7 E.A.D. at 368, 1997 EPA App. LEXIS 27 at *113; In Re Newell Recycling Co., Inc., TSCA Appeal No. 97-7, 8 E.A.D. 598, 615, EPA App. LEXIS 28, *39 (EAB 1999), aff'd, Newell Recycling Co., Inc. v. EPA, 231 F.3d 204 (5th Cir. 2000))); and

- Sixth, the March 25, 2011 Order applies the second prong of the EAB test in line with prior EAB decisions and other administrative and judicial rulings that evaluated the same or similar language. (March 25, 2011 Order at 6-9, 9-12). Consistent with the Board's prior decisions, the March 25, 2011 Order finds there is no temporal limitation (i.e., deadline) to extinguish the TSCA section 8(e) obligation to

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[3] The EAB's two-step test is well-established. The EAB's Harmon decision was the first where the Board held that the limitations period for continuing violations does not begin to run until the illegal course of conduct is complete. Harmon, 7 E.A.D. at 21, 1997 EPA App. LEXIS 6 at *49. In addition to Lazarus, which the Presiding Officer cited in the March 25, 2011 Order, the Board has reached this holding in subsequent cases. Newell, 8 E.A.D. at 614, 1999 EPA App. LEXIS 28 at *36 (citing Lazarus); Mayes, 12 E.A.D. at 65, 2005 EPA App. LEXIS 5 at *32 (citing Harmon).

[4] The Board has applied its two-pronged test for determining whether a particular violation is continuing in nature in a series of cases since the Harmon decision cited by the Presiding Officer. Lazarus, 7 E.A.D. at 366, 1997 EPA App. LEXIS 27 at *110, *112; Newell, 8 E.A.D. 598 at 615-16, 1997 EPA App. LEXIS 28 at *37-40; Mayes, 12 E.A.D. at 65, 2005 EPA App. LEXIS 5 at *32.

inform and therefore a section 8(e) violation is continuing in nature.[5]

In keeping with the EAB's decisions, the Presiding Officer in the March 25, 2011 Order takes into account the purpose of the TSCA section 8(e) requirement to conclude that the obligation must be continuing in nature, considering both the statutory framework and Congressional intent. (March 25, 2011 Order at 11-12). As the Presiding Officer notes, the EAB and other tribunals have observed in analogous situations that to conclude otherwise would frustrate the purpose of the statutory requirement because "a manufacturer could violate the reporting requirement without fear of punishment if it could successfully hide the evidence . . . for five years."[6] Id. at 11 (citing United States v. Advance Machine Co., 547 F. Supp. 1085, 1090 (D. Minn. 1982)). The Presiding Officer also notes that the conclusion that TSCA 8(e) must impose a continuing duty mirrors the conclusions reached by other tribunals of the same or

[5] In Newell, where the Board analyzes a different regulation from TSCA section 8(e), the EAB states, "Viewed as an obligation, the regulation on its face carries no temporal limitation. It does not, as we expressed the idea in *Lazarus*, prescribe a 'requirement[] that must be fulfilled within a particular time frame.' On the contrary nothing in the regulation remotely suggests that the obligation described is discharged or extinguished simply with the passage of time. Instead, the obligation is discharged only with the occurrence of a specified event—the proper disposal of PCB-contaminated soil at an incinerator or a chemical waste landfill." Newell, 8 E.A.D. at 617, 1999 EPA App. LEXIS 28 at *42.

[6] Respondent asserts that the March 25, 2011 Order "disregards" the D.C. Circuit's 3M decision which involved the discovery rule. (Resp't Mot. Requesting the Presiding Officer to Recommend Interlocutory Review of the March 25, 2011 Order by the Envtl. Appeals Bd., ¶ 3). However, the instant case rests solely upon the doctrine of continuing violations. Therefore, Respondent's assertion is without merit.

similar requirements to "immediately" inform a regulator of a potential harm. Id. at 9-11 (discussing In Re Union Carbide Corp., EPA Docket No. TSCA 85-H-02, 1985 EPA ALJ LEXIS 13 (ALJ, October 3, 1985); Advance Machine; and United States v. Canal Barge Co., 631 F.3d. 347 (6th Cir. 2011)). In addition, the Presiding Officer reiterates in her analysis that the recurring theme in all of these cases is this type of duty to report must be ongoing "because the need to notify [a regulator] of a hazardous condition does not dissipate over time." Id. (citing Canal Barge Co., 631 F.3d at 352). As the EAB has held in Harmon and its progeny, any other conclusion would result in an unacceptable public policy outcome.[7]

As required by the standard for interlocutory appeal, Respondent has neither asserted nor established that review after the final order is issued would be inadequate or ineffective. In addition, Respondent has provided no explanation as to how an immediate appeal from the March 25, 2011 Order will materially advance the ultimate termination of the proceeding. Respondent's mere assertion to that effect is

[7] In the EAB cases where the Board has found continuing violations, the EAB has consistently rejected the argument that such ongoing violations were instantaneous and complete when they first occurred. As stated by the EAB in Harmon, "To accept Harmon's argument leads to a fundamentally absurd result, seemingly contrary to the Act's purposes...." Harmon, 7 E.A.D. at 29, 1997 EPA App. LEXIS 6 at *66. Similarly, the Board in Newell states, "Indeed, to conclude otherwise would produce an outcome difficult to reconcile with the policy thrust of the statute and the regulations." Newell, 8 E.A.D. at 618, 1999 EPA App. LEXIS 28 at *46. Moreover, the EAB in Mayes states, "To conclude otherwise would produce an outcome difficult to reconcile with the penalty objectives of the statute and regulations. Mayes, 12 E.A.D. at 71, 2005 EPA App. LEXIS 5 at *46.

not supported by argument or facts. To the contrary, the resolution of this proceeding, which has been pending since September, 2010, would be further delayed if interlocutory review was granted. In fact, because there are no genuine issues of material fact, Complainant is prepared to file a motion for accelerated decision as soon as this interlocutory appeal matter is resolved.

In short, TSCA section 8(e) is a classic example of a continuing statutory duty. The duty to report under section 8(e) is an affirmative duty to report substantial risk information about chemical hazards without a temporal limitation. This duty begins immediately, as soon as a person obtains 8(e) reportable information, and continues until either the person informs the Administrator of the information or has actual knowledge that the Administrator has been adequately informed of such information.[8] Congress imposed the section 8(e) disclosure duty on chemical manufacturers and other members of the industry to ensure that the Agency and the public are kept timely apprised of new information about chemical hazards.

The information obtained by Respondent in 2002 showed increased lung cancer mortality risk to workers from exposure to

[8] As noted by the 6th Circuit in considering an analogous reporting duty, "the 'immediate' start of the obligation does not mean that the obligation ceases as soon as there has been some delay in reporting. The natural reading . . . instead, is that the obligation to report starts immediately when the relevant actor has the relevant knowledge, and continues at least until a report is made . . ." (March 25, 2011 Order at 11 (citing Canal Barge Co. at 352)).

hexavalent chromium, a known carcinogen, in modern chromium production plants. This information about hexavalent chromium exposure hazards was new information in 2002 and is still relevant today to the scientific understanding of lung cancer mortality risk under modern plant conditions. Importantly, as noted by the Presiding Officer, the Agency's need for substantial risk information about chemical hazards in the information obtained by Elementis does not dissipate with time. (March 25, 2011 Order at 12). Respondent's position would impose a cut-off, after which there would be no ongoing duty to report, thereby thwarting the purpose of the statute.

For the foregoing reasons, Complainant respectfully requests that the Presiding Officer deny Respondent's Motion Requesting the Presiding Officer to Recommend Interlocutory Review of the March 25, 2011 Order by the Environmental Appeals Board for failure to meet the standard for interlocutory appeal.

Respectfully submitted,

4-14-2011
Date

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CERTIFICATE OF SERVICE

I certify that the foregoing *Complainant's Response to Respondent's Motion Requesting the Presiding Officer to Recommend Interlocutory Review of the March 25, 2011 Order by the Environmental Appeals Board* in Docket No. TSCA-HQ-2010-5022, dated April 14, 2011, was sent this day in the following manner to the addressees listed below:

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